

Law and Justice in the Nazi SS: The Case of Konrad Morgen

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THE role of law in the totalitarian state is problematic. In principle, law and unfettered political authority are antithetical but, in practice, the two have coexisted in uneasy and unequal partnership. As the Third Reich neared its apex in terms of internal and external power, a German expatriate described it as a "dual state" in which law existed side-by-side with the dynamic, ideologically charged will of the Führer.¹ Duality did not imply balance, however, for law survived largely as a discretionary tool of total power. Nevertheless, pretotalitarian legality was never entirely deprived of a residual potency, a fact illustrated by an unlikely agent—SS-*Sturmabführer* (Major) Dr. Georg Konrad Morgen, judge in the judicial branch of the SS. But the organizational context of Morgen's career is sufficiently unfamiliar as to require elucidation.

Of the myriad organs of the Nazi movement, none was as important a vehicle of totalitarian dynamism as the SS. Propelled by Heinrich Himmler and his implacable lieutenant, Reinhard Heydrich, the SS absorbed nonmilitary police functions within the German Reich and progressively undermined or circumvented the orthodox judicial system, itself increasingly permeated by Nazi influences. The extralegal concept of *Schutzhaft* (protective custody) and the institution of the concentration camp became the chief tools of control wielded by the SS. As Germany expanded beyond its borders, the SS served as the executor of

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1. The expatriate was Ernst Fraenkel, who published *The Dual State: A Contribution to the Theory of Dictatorship* in 1941. See Martin Broszat, *The Hitler State: The Foundation and Development of the Internal Structure of the Third Reich* (London and New York, 1981), pp. 328–29.

savage repression and extermination in massive contravention of international law.

In terms of its primary functional thrust, then, the SS stood in obvious contradiction of the rule of law and, on occasion, collided with institutions in which substantial remnants of pretotalitarian legality survived. Prewar judicial authorities occasionally asked awkward questions concerning the large numbers of concentration camp inmates who died violent deaths while, in Poland, some army field commanders were sufficiently incensed by SS atrocities to bring offenders to military justice.² In practical terms, these intrusions were little more than annoyances but they implied a challenge to Himmler's overarching ambition: to create for service to Hitler a body of political soldiers characterized by maximum flexibility and reliability and uninhibited by "bourgeois" moral scruples or external authority. But the threat, insofar as it emanated from agencies claiming disciplinary powers over SS members, was largely eliminated when, in October 1939, the SS and police were granted *Sondergerichtsbarkeit* (special jurisdiction) by Hitler over members accused of criminal acts.³

At first, not all SS men and police officials were subsumed under special jurisdiction, but those at the functional "cutting edge" of the SS complex were, including full-time employees of the SS bureaucracy, the *SS-Verfügungstruppe* (pre-1940 military SS), the *SS-Totenkopfverbände* (concentration camp operatives), members of the *SS-Junkerschulen* (officer training academies) and the personnel of police units "in special employment." The final category embraced combat police units but was soon expanded to include the whole of the *Sicherheitspolizei* (Gestapo and Criminal Police) and *Sicherheitsdienst* (SS security service). Throughout the war, the scope of special jurisdiction expanded in consonance with Himmler's growing authority.⁴

Responsible for the administration of justice under SS special jurisdic-

2. Martin Broszat, "Nationalsozialistische Konzentrationslager 1933-1945," in Helmut Krausnick et al., *Anatomie des SS-Staates*, 2 (Munich, 1967): 53-55 (hereafter *Anatomie*); Helmut Krausnick and Hans-Heinrich Wilhelm, *Die Truppe des Weltanschauungskrieges: Die Einsatzgruppen der Sicherheitspolizei und des SD, 1938-1942* (Stuttgart, 1981), pp. 80-83.

3. Ibid., p. 87; Hans Buchheim, "Die SS—das Herrschaftsinstrument," *Anatomie*, 1:153.

4. Ibid., 1:154-57; *Mitteilungen des Reichsführers SS und Chef der Deutschen Polizei, Hauptamt SS-Gericht* 2, no. 3:76-77 (hereafter *Mitteilungen*) in Records of the Reich Leader of the SS and Chief of the German Police, U.S. National Archives and Record Service Microcopy No. T-175, Roll 3, Frames 2503701-2 (hereafter cited in the following form: T-175/3/2503701-2).

tion was a system of SS and police courts supervised by the *Hauptamt SS-Gericht* (Main Office SS Court), established in June 1939 in obvious anticipation of judicial independence.⁵ Most courts were attached to the headquarters of the regional SS and Police Leaders (*Höhere SS und Polizei Führer*) with "field courts" (*Feldgerichte*) organized for major units of the *Waffen SS*. A "Highest SS and Police Court" was given jurisdiction over cases involving espionage and treason, attacks upon the person of the Führer, sabotage, and the trials of all general officers (*SS-Brigadeführer* and above).⁶

In form, the SS judicial system closely followed that of the *Wehrmacht*. *Gerichtsherren* (convening authorities) initiated inquiries, brought charges, assembled courts, and confirmed (or refused to confirm) verdicts. Both Hitler and Himmler could act in this capacity, although such responsibilities were routinely discharged by the heads of the SS main offices in cases involving their subordinates, or by the Higher SS and Police Leaders and *Waffen SS* field commanders.⁷ *Gerichtsherren* often initiated court proceedings on the basis of evidentiary reports (*Tatberichte*) forwarded to them by *Gerichtsoffizieren* or *Gerichtsführer* ("court officers" of the police and SS respectively), who served in active units and functioned as liaison figures with the judicial system.⁸ Cases actually brought to trial were heard by *SS-Richter* (SS Judges). These were agents of the *Hauptamt SS-Gericht* who possessed formal legal training and who were appointed to office by Hitler. As in military courts, professional judges shared their benches with lay judges (*Beisitzer*) drawn from active units.⁹ During trials, judges questioned the accused and evaluated evidence, ruling on its admissibility. Following summation of prosecution and defense cases (the latter was given the last word), the bench retired to reach a verdict which was announced and explained by the SS Judge.¹⁰

5. Bernd Wegner, *Hitlers politische Soldaten: Die Waffen-SS 1933-1945* (Paderborn, 1982), p. 269, n. 22.

6. *Anatomie*, 1:158-59; *Mitteilungen* 1, no. 1:6-7, and 1, no. 6:147, T-175/3/no frame number.

7. Ibid. 1, no. 1:5, T-175/3/no frame number.

8. "Merkblatt für Gerichtsoffiziere," n.d., p. 1, T-175/3/2503792. See also "Auszug aus Befehlsblatt Nr. 6 vom 12.2.44," p. 2, T-175/3/2503877 and *Mitteilungen* 2, no. 3:79, T-175/3/2503702, and 1, no. 1:8, T-175/3/no frame number.

9. Ibid. 1, no. 1:6, 9, T-175/3/no frame numbers, and 2, no. 3:78-79, T-175/3/2503702. See also *Trials of the Major War Criminals Before the International Military Tribunal at Nuremberg, Germany* (Nuremberg, 1947), 20:416 (hereafter *IMT*).

10. Ibid. On military court procedure, see Otto Peter Schweling, *Die deutsche Militärjustiz in der Zeit des Nationalsozialismus* (Marburg, 1978), pp. 23-27.

Although there was no formal avenue of appeal, a trial which culminated in a sentence more severe than a year's incarceration required review by another SS Judge, while confirmation by the *Gerichtsherr* was necessary before a verdict became legally binding.¹¹ Additional flexibility was provided by the right of *Gerichtsherren* to reduce sentences for offenses which did not entail the death penalty or terms of imprisonment in the penitentiary (*Zuchthaus*). *Gerichtsherren* also determined whether jail or penitentiary sentences were to be served immediately or postponed until the end of the war. Imprisonment in a traditional penal institution might well seem preferable to combat service on the Eastern Front. *Gerichtsherren*, therefore, had the authority to consign malefactors to hard labor in the SS and Police Penal Camp (*Straflager der SS und Polizei*) at Dachau for the war's duration, the serving of prison sentences to commence only upon German victory.¹² By the summer of 1941, at which time manpower demands for the *Waffen SS* were growing apace, it was possible for an SS convict to escape imprisonment altogether through assignment by a *Gerichtsherr* to a *Bewährungseinheit* (probationary unit). This generally entailed continuous and highly dangerous combat service, such as clearing land mines, and offered an opportunity for clemency to survivors who had demonstrated bravery and devotion to duty.¹³

The judicial mechanism which functioned under *Sondergerichtsbarkeit* was in no danger of atrophying as a result of disuse. During the first quarter of 1943, for example, 2,764 verdicts were handed down by SS and police courts and confirmed, resulting in 69 death sentences and over 2,000 prison terms.¹⁴ But, although paralleling the system of German military justice structurally, the SS judicial organization did not simply replicate it for within it and to a greater degree than in the *Wehrmacht*, law and "justice" were intended to serve the ideological goals of the Nazi movement.

While the SS judicial system took cognizance of military and civilian

11. *Mitteilungen* 1, no. 1:10, T-175/3/no frame number; "Merkblatt für Gerichtsoffiziere," p. 7, T-175/3/2503798.

12. Hauptamt SS-Gericht, XXI (RA III), 1139/40, July 15, 1940, p. 3, T-175/3/2503776. *Mitteilungen* 1, no. 4:79-80, T-175/3/no frame number.

13. Ibid. 1, no. 4:94-95, T-175/3/no frame number.

14. "Hauptamt SS-Gericht: Auszug aus der Kriminalstatistik für das 1. Vierteljahr, 1943," T-175/60/2576152-54. A small fraction of these cases involved foreigners who were not in the service of the SS, but twenty-nine of the death sentences were handed down against such persons.

penal law and often applied it, it was not constrained by such law. Justice had to be shaped to suit the requirements of National Socialism, argued a spokesman for the *Hauptamt SS-Gericht*. Only from that perspective would solutions be found to problems not yet satisfactorily solved in law, including the "killing of lives unfit to live" (*Tötung lebensunwerten Lebens*).¹⁵ Accordingly, the SS Judge was expected to conduct himself in a manner fundamentally different from that of the traditional judge. No slave to the letter of the law, he was, ideally, a political fighter and educator to whom principle took precedence over paragraph. Not only were his decisions expected to directly further the ideological aims of the movement, but also to serve as precepts supplementing the ideological indoctrination of SS members. Thus, it was reported by the *Hauptamt SS-Gericht*, two Waffen SS men were tried for having had intercourse with a black prostitute in a French brothel. In spite of the fact that the relevant legislation (the "Law for the Protection of German Blood and German Honor" of September 15, 1935) forbade in its second article extramarital intercourse only between Germans and those of "related" blood and Jews, the two defendants were expelled from the SS and sentenced to two years in prison, the presiding judge observing that German blood and honor were as much injured by intercourse with a Negro as with a Jew.¹⁶ Similarly, an ethnic German SS member was led to expect severe punishment for like offenses, even though he might not be a subject of the German Reich; citizenship was a sterile formality far overshadowed by his status as a man of German blood.¹⁷

Other decisions sought to foster relationships between superior and subordinate in harmony with the image of the SS as a Germanic warrior band, in which obedience was given out of respect and admiration rather than as the products of abuse and fear. An *SS-Unterscharführer* (Sergeant) was allegedly sent to prison for several months for having compelled an enlisted man to pick up with his teeth a rifle cartridge which the soldier had dropped during loading drill. Both personal dignity and Aryan fecundity were affronted by the *SS-Oberscharführer* (Technical Sergeant) who publicly berated an SS reservist and *pater familias* who failed to wear his cap at the proper angle with, "He can't

15. *Mitteilungen* 1, no. 1:3, and 1, no. 6:149, T-175/3/no frame number.

16. *Ibid.* 1, no. 2:36-37, T-175/3/no frame number. See Walther Hofer, ed., *Der Nationalsozialismus: Dokumente, 1933-1945* (Frankfurt a.M., 1957), p. 285.

17. *Mitteilungen* 1, no. 6:149, T-175/3/no frame number.

put his cap on straight, but he can screw (*ficken*)! The guy has four kids. Look at the idiot!" For the insult and for his efforts to prevent the victim from reporting it, the noncommissioned officer was imprisoned for three months. SS men were assured that, under a National Socialist regime, they had not only the right but the duty to protest assaults by superiors on their honor and self-respect.¹⁸

But the alleged primacy of ideological goals could also work to the advantage of the defendant. The SS was a fighting organization and excessive zeal in dealing with "the enemy" was seldom punished with severity. Murder was still a crime, however, and the inmates of concentration camps, in principle, were under the protection of law. The unnatural deaths of prisoners held in protective custody required investigation by the competent *Gerichtsführer*, with criminal charges against the SS men responsible a theoretical consequence. But due, in part, to the routine falsification of evidence by concentration camp *Gerichtsführer*, these very numerous incidents seldom led to trials before SS and police courts and, even less frequently, to convictions.¹⁹ When they did occur, convictions were likely to result in light sentences subject to modification. The commandant of the Vught transit camp in the Netherlands was sentenced to three-and-a-half years in prison for having caused the deaths of large numbers of prisoners through the overcrowding of arrest cells. Himmler's intervention resulted in an eight-day furlough for the convict, followed by abbreviated combat training and assignment as a private to SS Panzer Division "Totenkopf" on the Eastern Front.²⁰ This was disciplinary action which preserved personal honor although, given German fortunes of war at that time (March 1944), was not insignificant.

To be sure, many cases tried before SS and police courts lacked obvious ideological relevance. Violations of traditional standards of military conduct, including unauthorized absences from duty, disobedience to orders and the like, were frequent objects of prosecution, although cases of this sort occasionally hinted at the political mission of the SS. In December 1943, the *Hauptamt SS-Gericht* urged more frequent pun-

18. Ibid. 1, no. 2:38-39, T-175/3/no frame number. See Hans Buchheim, "Befehl und Gehorsam," *Anatomie*, 1:254-55.

19. *IMT*, 20:492; "Anklageschrift gegen SS-Staf. Koch und Dr. Hoven: Wesentliches Ermittlungsergebnis," Apr. 11, 1944, Nuremberg Trial Document NO-2366, pp. 46-47 (hereafter "Anklageschrift").

20. Himmler to Bender, Mar. 16, 1944 in Helmut Heiber, ed., *Reichsführer! . . . Briefe an und von Himmler* (Stuttgart, 1968), p. 254.

ishment of officers who, contrary to orders, took photographs of events which were better left unfilmed. Serious harm might be done, the *Hauptamt* warned, if photographs of executions fell into the wrong hands.²¹

But a very large number of offences for which SS members were tried were derived from that broad area of law and morality which had not departed significantly from pre-Nazi norms. Individuals were prosecuted for assault and battery, manslaughter, drunkenness, rape, homosexuality and the like but, of all offenses, none were as common as crimes against property. In fact, of all persons convicted under SS and police jurisdiction in 1942, forty-two percent were found guilty of property-related crimes, a percentage which was slightly exceeded in the first quarter of 1943.²² The high incidence of prosecution for crimes against property was in harmony with Himmler's thoroughly bourgeois preoccupation with the "sanctity of property" (*Heiligkeit des Eigentums*).²³ The *Reichsführer-SS* was convinced that diminished respect for public and private property was a measure of the degree to which the German people had wandered from their roots in ancient Germanic society in which theft was regarded as the most heinous of crimes and where, at least in romantic imagination, a plot of land could be protected from trespass by a loosely twisted rope of straw strung round its borders. Alien influences had diluted respect for property rights, Himmler believed, and it was part of the mission of National Socialism and its militant vanguard, the SS, to restore this element of *Volk* consciousness to health. It had been in November 1936, with this goal in mind, that Himmler had ordered all locks removed from personal storage facilities in the barracks of the armed SS and directed that the concept of the sanctity of property be stressed so frequently that an SS man would refrain from stealing even so trivial an item as a cigarette.²⁴

Ironically, therefore, the "bourgeois morality" referred to so scornfully by SS spokesmen in some contexts constituted a substantial fraction of the SS ethos, a fact admirably reflected in the SS career of Konrad

21. *Mitteilungen* 2, no. 6:184, T-175/3/no frame number.

22. "Auszug aus der Kriminalstatistik für das 1. Vierteljahr, 1943," T-175/60/2576152-54; *Mitteilungen* 2, no. 5:143, T-175/3/2503739.

23. See "Befehle des Reichsführers-SS über die Heiligkeit des Eigentums," *Mitteilungen* 1, no. 5:108-10, T-175/3/no frame number.

24. *Ibid.* 1, no. 5:111-14, T-175/3/no frame number.

Morgen. Morgen was the offspring of a working-class family who, by dint of hard work and parental sacrifice, had succeeded in elevating himself to the ranks of the *Bildungsbürgertum*. Broad international training in the law at the Universities of Frankfurt, Rome, and Berlin, in the Hague and at the Institute of World Economics and Maritime Commerce in Kiel was accompanied by membership in the NSDAP and the *Allgemeine-SS*. The "new man" had joined the new élite largely, it would appear, to advance his career.²⁵ After a brief period on the civil bench, which might have been cut short by a refusal to hand down a verdict desired by the party, Morgen experienced the early months of the war as a trooper in the *Waffen SS* and was then assigned to duty with the recently-established *Hauptamt SS-Gericht*. The newly-appointed *SS-Richter* was to pursue his responsibilities with greater energy than some might have preferred.

Following a short orientation in Munich, Morgen was posted in January 1941 to SS and Police Court VI in Cracow, capital of the Polish *Generalgouvernement*.²⁶ There, Morgen witnessed Nazi exploitation at its most brutal, coupled with rampant individual corruption. Within a few months of his appointment, Morgen had penetrated deeply into a dense system of SS malfeasance and had arrested the chief of the main SS supply dump, *SS-Hauptsturmführer* (Captain) Dr. Georg von Sauberzweig and his entire staff for corruption "in the grand manner." Sauberzweig had requisitioned Polish property by the truckload, had sold it, and had shared the proceeds with his cooperative subordinates. Although a party "old fighter," he was tried, convicted, and sentenced to death by firing squad, a sentence which was executed following an unsuccessful appeal for clemency to Hitler.²⁷

Investigation of the von Sauberzweig case led Morgen to a more complex and sensitive instance of corruption, one which was not to be resolved in so decisive a manner. As von Sauberzweig was being taken into custody, he was heard to call to his wife, "Call *Standartenführer*

25. Berlin Document Center (hereafter BDC), SS-Personalakte Morgen; interrogations of Morgen by U.S. war crimes investigators on Aug. 30, 1946, pp. 1-2, and on Sept. 19, 1946, pp. 1-2, U.S. National Archives and Record Service Microcopy 1019/47/496-97, 562-63.

26. Morgen interrogation of Aug. 30, 1946, loc. cit.; *U.S. vs. Josias Prinz zu Waldeck, et al.*, National Archives and Record Service, Record Group 153, War Crimes Case No. 12-390 (Buchenwald), Roll 12, transcript page 2737 (hereafter Buchenwald Trial).

27. Morgen interrogation of Aug. 30, 1946, p. 8, 1019/47/503; affidavit by Morgen, Feb. 26, 1947, pp. 3-4, NO-1900.

[Colonel] Fegelein immediately, and tell him that I've been arrested."²⁸ The *SS-Standartenführer* whose assistance was sought was none other than Hermann Fegelein, former jockey, favorite of Himmler's, later to marry Eva Braun's sister, Gretl, and ultimately to be shot on Hitler's orders during the cataclysmic last days of the Third Reich. Morgen's probings into von Sauberzweig's speculations had revealed that large quantities of luxury items had been sold to the SS supply dump under suspicious circumstances by members of the First SS Cavalry Regiment, the unit under Fegelein's command. Furthermore, von Sauberzweig had turned over control of the confiscated Jewish firm of furriers Nathan and Apfelbaum to *SS-Hauptsturmführer* Alfred Fassbender, son of a Berlin chocolate manufacturer and an officer in Fegelein's regiment. It was later claimed by the participants that their aim had been to use the extensive international connections of the business for purposes of espionage but, in fact, there was no evidence of activity other than selling furs to German customers. Day-to-day operations of the firm rested in the hands of Jaroslawa Mirowska, a Polish-Russian employee of the former owners (and sometime mistress of one) who claimed German ancestry and with whom Fassbender had established a liaison. A vivacious and multilingual woman, she had been introduced by Fassbender and Fegelein to Himmler, on whom she had made a favorable impression.²⁹

Morgen's investigation of the shady enterprise immediately encountered vigorous resistance from Fegelein and, ultimately, from the *Reichsführer-SS* on whose orders the probe was abruptly terminated.³⁰ What had become of Himmler's oft-proclaimed devotion to the "sanctity of property"? It is likely that Himmler chose to believe Fegelein's protestations of innocence and claims of persecution at the hands of SS and Police Court VI, a decision based not only on personal acquaintance but, more significantly, on political expedience. Himmler was working to undermine his chief rival for dominance in the *Generalgouvernement*, Governor Hans Frank, and would, ironically, level charges of corruption against him which were to involve lavish purchases by Frau Frank

28. "Aktenvermerk," Apr. 21, 1941, p. 1, NO-2366.

29. Ibid., pp. 1-2; Morgen interrogation of Aug. 30, 1946, p. 14, 1019/47/509. "Aktenvermerk," SS und Polizeigericht VI, Sept. 8, 1941, p. 4, NO-2366.

30. Morgen interrogation of Aug. 30, 1946, p. 16, 1019/47/511. See also Pohl (*not Oswald Pohl*) to Scharfe, Sept. 8, 1941, NO-2366.

from Nathan and Apfelbaum.³¹ It must have been clear to the *Reichsführer* that scandal involving his associate would seriously weaken his position in the struggle with Frank. In any event, Morgen's quarry had escaped him and he had made powerful enemies into the bargain. Chief among these was SS-*Gruppenführer* (Major General) Oswald Pohl, head of the *Hauptamt Verwaltung und Wirtschaft/Haushalt und Bauten* (Economic and Administrative Main Office/Budget and Construction), whose tacit approval of much of the corruption thus far encountered seemed evident to Morgen.³²

Morgen experienced further frustration in his pursuit of the infamous SS-*Obersturmführer* (First Lieutenant) Dr. Oskar Dirlewanger, inveterate child-molester who commanded an irregular unit composed of convicted poachers. *Sonderkommando* (Special Command) Dirlewanger had been organized with the assistance of Dirlewanger's patron, SS-*Obergruppenführer* (Lieutenant General) Gottlob Berger, Chief of the SS-*Hauptamt* (SS Main Office) and dispatched to the *Generalgouvernement* for the ostensible purpose of road construction. Morgen was made aware of their presence by a profusion of reports of assaults and robberies emanating from the Lublin area, where the unit was stationed. Closer investigation revealed worse. Dirlewanger had employed his men to round up Jews and hold them for ransom, shooting those unable or unwilling to pay. The *Sonderkommando* had also surrounded and systematically plundered the Lublin ghetto, then sold the loot back to its former owners. Young Jewish women had been injected with strychnine for Dirlewanger's entertainment, and soap purportedly made from their remains. Most reprehensible from the ideological perspective of the SS was the fact that Dirlewanger had established sexual relationships with Jewish girls and taken pleasure in flaunting them.³³ In a confidential letter to a superior dated November 2, 1941, Morgen complained that the despotism exercised by Dirlewanger around Lublin was having a negative impact on the economic health of the region but that complaints registered with SS-*Brigadeführer* (Brigadier General) Odilo Globocnik, SS and Police Leader of Lublin, had been without effect.³⁴ Ulti-

31. Heinz Höhne, *Der Orden unter dem Totenkopf: Die Geschichte der SS* (Gütersloh, 1967), pp. 294-95.

32. Morgen interrogation of Aug. 30, 1946, pp. 10-12, 1019/47/505-07.

33. Morgen, "Eidesstattliche Erklärung," Jan. 28, 1947, pp. 1-2, NO-1908; George H. Stein, *The Waffen SS: Hitler's Elite Guard at War, 1939-1945* (Ithaca, 1966), pp. 266-67.

34. Morgen to Pohl, Nov. 2, 1941, NO-2366.

mately, Morgen approached SS-Obergruppenführer Friedrich Wilhelm Krüger, Higher SS and Police Leader East with headquarters in Cracow, with an arrest order for Dirlewanger and his entire unit. But Krüger had disturbing information. Although his jurisdiction extended throughout the *Generalgouvernement*, he was not the *Gerichtsherr* competent to initiate proceedings against *Sonderkommando Dirlewanger*, which was subordinate to Berger, its creator and protector. A tense telephone call from Krüger to Berger secured the withdrawal of Dirlewanger's unit from the *Generalgouvernement* but not its punishment or an end to its depredations.³⁵

That Morgen, in time, should have fallen victim to a sense of futility must occasion little wonder. The punishment of persons who were archcriminals even by the very restricted but much-publicized standards of the SS was prevented by the personal ambitions and feudal loyalties of the upper reaches of the SS hierarchy. Nor did Morgen conceal his feelings. In November 1941 he complained that, in view of the proliferation of serious cases, ". . . again and again uncertainty arises concerning how and to what degree one can act and whether interests of a higher nature will be affected. . . ."³⁶ Four months later Morgen was begging to be relieved of duty in the *Generalgouvernement*. In a letter to *Obersturmbannführer* (Lieutenant Colonel) Hinderfeld of the *Hauptamt SS-Gericht*, he noted, "The corruption in the *Generalgouvernement* is so great and property crimes and offenses of a revolting nature so numerous that I am deeply convinced that any judge, in time, must find himself somewhat dulled, and the danger therefore exists that his natural sense of justice will suffer damage. You will therefore understand, *Obersturmbannführer*, if I have the intense desire to live once again in a healthier atmosphere than in the *Generalgouvernement*."³⁷

Morgen was soon to depart the *Generalgouvernement*, but under circumstances different from those which he would have preferred. He had hoped for transfer to a judicial post in Norway or the Balkans. In fact, in what must have been a formal disciplinary procedure, he was broken from the rank of SS-Obersturmführer to that of SS-Sturmmann (Private), sent to the punishment company of a training battalion in Stralsund and dispatched in December 1942 to SS-Panzer-Grenadier

35. Morgen interrogation of Aug. 30, 1946, p. 23, 1019/47/518.

36. Morgen to Pohl, Nov. 2, 1941, NO-2366.

37. Morgen to Hinderfeld, Mar. 27, 1942, p. 3, NO-2366.

Division "Wiking," then fighting on the southern sector of the Eastern Front.³⁸

The precise circumstances surrounding Morgen's punishment are unclear. He later claimed that the immediate occasion for his degradation had been his acquittal of a defendant in a case of *Rassenschande*, but that this had been simply a pretext used to silence a man whose career had become a threat to powerful figures in the SS. If Morgen is to be believed, matters might have gone even more seriously for him. He learned from a confidant in the *Hauptamt SS-Gericht* that Himmler had prepared an order calling for his imprisonment in a concentration camp but that demotion and transfer to the front had been adopted as a compromise following vigorous objections by his judicial superiors.³⁹ Should events have taken place as Morgen claimed, the *Reichsführer-SS* had been guilty of a blatant violation of the principle of judicial independence, a principle with which, in any case, he could not have been comfortable. Whatever the background, Morgen disappeared into combat service from which some, no doubt, hoped he would not return. Yet, Morgen was recalled from the front in May 1943, restored to his former rank, and on Himmler's order attached to the *Reichskriminalpolizei* (Reich Criminal Police Office) while regaining the status of SS Judge.⁴⁰

The motives behind Morgen's rehabilitation were purely utilitarian. A major case of corruption involving the Buchenwald concentration camp had surfaced, and experienced investigators were in short supply. Malfeasance in the administration of the concentration camps had become a highly sensitive matter, for the camps had become components of the German war economy and an avenue whereby Himmler hoped to secure economic independence for the SS.⁴¹ The "sanctity of property" had taken on new and pragmatically significant dimensions!

By the time that Konrad Morgen entered the investigation, suspicions that all was not in order in Buchenwald were old. In December 1941 *SS-Standartenführer* Karl Koch, camp commandant, had been ar-

38. Morgen, "Eidesstattliche Erklärung," Jan. 28, 1947, pp. 3-5, NO-1900; "Vernehmung von Dr. Konrad Morgen," Oct. 21, 1946, p. 1, 1019/47/627.

39. Morgen interrogation of Aug. 30, 1946, pp. 18-19, 1019/47/513-14.

40. Ibid., p. 20, 1019/47/515; Morgen interrogation of Sept. 4, 1946, p. 5, 1019/47/526.

41. See Enno Georg, *Die wirtschaftlichen Unternehmungen der SS*, Schriftenreihe der Vierteljahrshäfte für Zeitgeschichte, no. 7 (Stuttgart, 1963), pp. 61-62; Albert Speer, *Infiltration: How Heinrich Himmler Schemed to Build an SS Industrial Empire*, trans. Joachim Neugroschl (New York, 1981), p. 3.

rested at the instance of *SS-Obergruppenführer* Josias Erbprinz zu Waldeck und Pyrmont, Higher SS and Police Leader Kassel, within whose jurisdiction Buchenwald lay. In response to rumors of financial mischief and unconvincing *Tatberichte* on the deaths of prisoners shot "while trying to escape," Waldeck had begun a probe into the operation of Buchenwald which produced evidence of peculation and resulted in Koch's incarceration at Gestapo headquarters in Weimar. But, again, the intervention of powerful personalities succeeded in nullifying the operation of the SS judicial and penal system. Pohl and *SS-Brigadeführer* Richard Glücks, Inspector of Concentration Camps, pleaded on Koch's behalf to Himmler, resulting in a brusque telegram from the *Reichsführer* to Waldeck ordering Koch's immediate release. Further investigation of conditions at Buchenwald was entrusted to a special representative of the *Hauptamt SS-Gericht* who failed to develop the case further.⁴² Koch was both rehabilitated and shielded from Waldeck's unwelcome attentions by transfer to the command of a new concentration camp (Maidanek) near Lublin.⁴³ At the same time, Koch's patrons sought to discourage a reopening of the case. Pohl wrote Koch a florid letter assuring the latter of his support and protection should any "unemployed lawyer" threaten him in the future. The recipient was properly appreciative and had hundreds of copies made and circulated.⁴⁴ Glücks visited Buchenwald and addressed both staff and inmates, declaring that all recent accusations against Koch had been slanderous and threatening anyone who might make similar statements with dire punishment.⁴⁵ Himmler contributed what came to be known in SS circles as "Lex Waldeck," an order forbidding the arrest of any officer of the rank of *SS-Standartenführer* or above or any concentration camp commandant without the *Reichsführer's* express approval.⁴⁶

But by the summer of 1943 Koch's position had deteriorated badly. Waldeck had not abandoned his pursuit, and the evidence assembled by Morgen was of so damaging a character that it could scarcely be ignored. Koch, moreover, had stumbled badly in his new command at Lublin. On the night of July 14, 1942, eighty-four Russian prisoners had escaped from the camp with the aid of makeshift ladders.⁴⁷ Koch

42. Buchenwald Trial, 7/5221-22, 5295-96.

43. "Dienstlaufbahn," BDC, SS-Personalakte Koch.

44. Buchenwald Trial, 12/2745.

45. *Ibid.*, 2864-65.

46. *Ibid.*, 2745 and Roll 7/5196, 5240.

47. See report on the escape dated July 15, 1942 in BDC, SS-Personalakte Koch.

attempted to assign responsibility for the breakout to the inattentiveness of two perimeter guards (one conveniently named "Schlaf"), but the two were acquitted of charges of negligence by SS and Police Court VI.⁴⁸ Koch, whose conduct was made a focus of investigation by Himmler's order, was relieved of his command and ultimately transferred to a minor police post in Eger which he maintained until his arrest in August 1943.⁴⁹

Morgen's investigation of Buchenwald's operation during the period 1937-42 was to result in Koch's conviction for multiple offenses and his eventual execution. Moreover, threads of corruption identified at Buchenwald were followed to other camps and, with the backing of the *Hauptamt SS-Gericht* and Waldeck, Morgen secured from Himmler broad authority to explore the whole of the concentration camp system. For that purpose, he was appointed chief investigating officer of a special SS and Police Court (*SS und Polizeigericht zur besonderen Verwendung*) initially established in the fall of 1943 as an adjunct to SS and Police Court XXII and later subordinated directly to the *Hauptamt SS-Gericht*.⁵⁰ As many as fifty officials were employed in the undertaking, and investigative commissions were assigned to most of the major concentration camps.⁵¹ Obstacles were not infrequent. Camp inmates were understandably reluctant to testify against SS personnel whose capacity for retaliation was unlimited. In at least one case, a key witness was promised freedom in return for his cooperation and, in fact, received it; but in Maidanek a large number of prisoners were murdered to forestall damaging testimony. Nor did the investigators proceed without personal risk. Court representatives were openly threatened in Auschwitz while, in Sachsenhausen, an investigative commission was forcibly ejected.⁵² After the war Waldeck, under whose jurisdiction the investigation initially operated, asserted that Glücks had offered him a

48. Koch to SS und Polizeigericht VI, Aug. 2, 1942; "Tatbericht," SS und Polizeigericht VI, July 15, 1942; "Feld-Urteil," SS und Polizeigericht VI, Aug. 17, 1942. BDC, Personalakte Koch.

49. Schmidt-Klevenow to SS und Polizeigericht VI, July 22, 1942, BDC, Personalakte Koch; "Anklageschrift," p. 2, NO-2366.

50. Morgen interrogation of Sept. 4, 1946, pp. 10-11, 1019/47/531-32; Buchenwald Trial, 7/5226-27, 12/2749; Waldeck interrogation of Mar. 5, 1947, p. 8, *ibid.*, 5/no frame number.

51. *IMT*, 20:478.

52. "Eidesstattliche Versicherung Paulmann, SS-Richter," n.d., pp. 6-7, Buchenwald Trial, 5/no frame number.

bribe in return for withdrawing his support for the probe, while threatening him with vague but dire consequences if he persisted.⁵³

Morgen was in no doubt as to the primary source of this obstructionism—SS *Obergruppenführer* Oswald Pohl, chief of the *Hauptamt* by which the concentration camp inspectorate had been absorbed. Nor was he uncertain about Pohl's motives. Pohl, Morgen was convinced, was deeply involved in the corruption which permeated the camp system and sought to protect subordinates from prosecution less from a sense of personal loyalty than from determination to conceal his own criminality. Pohl used his influence with Himmler in an attempt to limit the scope of Morgen's efforts, and the *Reichsführer* was vulnerable to such representations, for his feelings toward the investigations were clearly ambiguous. Given, on the one hand, his oft-proclaimed demand for "absolute purity" within the SS, he could hardly ignore the voluminous evidence of corruption uncovered by Morgen and his staff of sleuths. On the other hand, if allowed to operate without restraint, the investigation threatened to disrupt not only the terror system which was the chief *raison d'être* of the SS, but Himmler's ambitions for its economic independence as well. Ultimately, considerations of power would prevail over commitment to probity, but not before the normative essence of the SS was probed to uncomfortable depths.

Approximately eight hundred cases of misconduct were investigated prior to the end of the war. Of these, some four hundred were brought to trial with about half that number ending in convictions. Five concentration camp commanders were tried and two were sentenced to death, including Koch.⁵⁴ Much of the documentation generated by the investigations and trials did not survive the war, but Morgen's bill of indictment (*Anklageschrift*), prepared for the trial of Koch, his wife, and certain of his associates and dated April 11, 1944, has been preserved. The document is valuable as a reflection of an attenuated legality in conflict with the arbitrary character of the totalitarian regime.

Although Koch's multifarious venality, beginning on a massive scale with the *Judenaktion* of November 1938, was described in exhaustive detail, the suffering and death imposed by Koch's regime upon the inmates of Buchenwald were not overlooked. Koch's embezzlements, the indictment noted, had been accompanied by "barbaric and inhuman" (*barbarisch-grausam*) violations of moral laws (*Sittengesetzen*) involving

53. Buchenwald Trial, 7/5298.

54. *IMT*, 20:438.

beatings, starvation, and exposure of prisoners to extreme cold.⁵⁵ But it was in that section of the indictment entitled "Tötungskomplex" (killing complex) that the legal ramifications of concentration camp mortality were seriously explored.

Under National Socialist law, Morgen argued, authority to command the killing of concentration camp prisoners had been given by the Führer to Himmler, who had delegated it for certain categories of prisoners, notably *Ostvölker* (Eastern Peoples), to the *Reichssicherheitshauptamt* (RSHA). Killings not carried out in response to orders from these sources of authority were subject to judicial action, with the exception of the killings of sick prisoners in acts of euthanasia or to prevent the spread of contagious disease, homicides which were "without criminal significance" (*strafrechtlich ohne Bedeutung*).⁵⁶ Morgen was able to demonstrate without difficulty that numerous killings outside these categories of "legitimacy" had taken place in Buchenwald on the initiative of Koch and camp physician *SS-Hauptsturmführer* Dr. Waldemar Hoven with the assistance of *SS-Hauptscharführer* (Master Sergeant) Martin Sommer.⁵⁷ Koch had argued in his own defense that he had reported killings perpetrated without orders to Glücks's predecessor, *SS-Obergruppenführer* Theodor Eicke, and RSHA chief Reinhard Heydrich (both conveniently dead), and had received retroactive legitimization for them.⁵⁸ Hoven attempted to justify the murder of two prisoners who were to testify in the investigation of an instance of corruption with the claim that he was trying to spare his country a scandal which might have been intolerable in the fourth year of the war.⁵⁹ Morgen heaped scorn on these exculpatory efforts and stressed that no state could allow unauthorized persons to make themselves lords over life and death in the name of *raison d'état*.⁶⁰

The condemnation of irregular killings was not, in itself, an attack on the concentration camps in which they took place. Those deaths which were the result of individual initiative on the part of camp personnel comprised a small fraction of total camp mortality. But Morgen dared to suggest that it was the overall camp environment as created by

55. "Anklageschrift," p. 36, NO-2366.

56. *Ibid.*, pp. 46-47.

57. *Ibid.*, pp. 52-65, 67-77.

58. *Ibid.*, p. 53.

59. *Ibid.*, p. 78.

60. *Ibid.*, p. 81.

the "legitimate" authority of the state and party which made possible and, in fact, encouraged the "deviations" of Koch, Hoven, and others:

Concerning the character of Dr. Hoven, one can conclude to an even greater extent than with other concentration camp officials that it was only through the peculiar nature of his environment that he became a criminal. This is true not in the sense that the milieu [of the concentration camp] was capable of determining and changing an experienced man who, at the time of his assignment, was thirty-six years old. Decisive, rather, was the fact that restrictions fell away and that for years he, as well as many others, could have the feeling that the dependency of prisoners without rights, the indifferent conduct of superiors and the wall of secrecy surrounding the concentration camp permitted the expression of all instincts, even the lowest.⁶¹

This was treading on dangerous ground, and Morgen's thrust at the heart of the SS-dominated terror system was energetically countered once the trial commenced in September 1944 in Weimar before the SS and Police Court for Special Purposes.⁶² SS-Obersturmführer Schmidt-Klevenow, Pohl's chief legal advisor, was present along with Glücks, and attempted to neutralize the impact of Morgen's indictment on both pragmatic and legal grounds. During recesses for lunch, at which times observers and members of the court dined together, Schmidt-Klevenow argued that Morgen's handling of the case was damaging to the image of the SS and threatened to disturb the functioning of the concentration camp system, points which Pohl and others were also urging upon Himmler.⁶³ In testimony before the court, Schmidt-Klevenow suggested that the *Reichsführer's* injunctions against the killings of camp inmates might not have been intended literally, an opinion which was supported by private communication to the bench by at least one other witness.⁶⁴ Himmler was not queried on the matter, but it is not likely that such statements would have been made without his approval. Nor could Himmler have been uninvolved in the decision to recess the trial until December 1944 and relieve Morgen of his investigative duties.⁶⁵

61. Ibid., p. 86.

62. See memorandum of SS-Richter Ende of SS und Polizeigericht z.b.V. beim Hauptamt SS-Gericht, dated Jan. 6, 1945, BDC, SS-Personalakte Koch.

63. Morgen interrogation of Jan. 18, 1947, p. 3, 1019/47/729; Morgen interrogation of Sept. 4, 1946, pp. 21-22, 1019/47/542-43.

64. Morgen, "Short Remarks to the Bill of Indictment Against SS Standartenführer Koch, Formerly Commander of the KZ Buchenwald," pp. 2-3 in NO-2366 (hereafter "Short Remarks").

65. Ibid.; Ende memorandum of Jan. 6, 1945, BDC, SS-Personalakte Koch.

What remained was anticlimax. Morgen, who had been reassigned, no doubt maliciously, to routine judicial duties in Cracow, was restricted to a carefully controlled role as witness in the trial which resumed on December 18.⁶⁶ Sommer and Hoven, the defendants against whom evidence of murder had been least ambiguous, had been separated and the court weighed the guilt of Karl and Ilse Koch only in terms of fiscal corruption. Ilse was acquitted for lack of evidence while her husband was found guilty and sentenced to death, a sentence which was carried out by shooting at Buchenwald about a week before the liberation of the camp by United States forces in April 1945.⁶⁷

* * *

In assessing the significance of Konrad Morgen's wartime career and the judicial context in which it evolved, facile interpretations should be avoided. Morgen was no crypto-liberal working to undermine the Nazi regime and its instruments of coercion, nor was the SS judicial system an oasis of the rule of law in the totalitarian desert. The self-proclaimed function of the *Hauptamt SS-Gericht* was to facilitate the attainment of Nazi ideological goals, and it is evident that Morgen, while deploring its "excesses," regarded the SS as an admirable institution and sought to cleanse its image after the war.⁶⁸ But it would be equally imprudent to dismiss the intrusion of the SS judiciary into the morass of official criminality as an undertaking lacking import beyond a determination to protect Reich property from appropriation by rapacious SS functionaries, or even a distaste for homicide and brutality lacking official sanction. Morgen's characterization of the suffering and death imposed on inmates in Buchenwald as "inhuman and barbaric violations of moral laws" implied something more.⁶⁹

Practical consequences were clearly less dramatic. Morgen's postwar claim that his investigation had caused the closing of extermination camps cannot be accorded much credence, while concentration camp mortality actually increased in the final months of the war although, in part, for reasons associated with the disorganization of a state on the

66. Ibid.; Morgen, "Short Remarks," p. 3, NO-2366. See also "Interrogation Summary 150," p. 2, 1019/47/no frame number.

67. Buchenwald Trial, 7/5223-24, 12/3713-14; Morgen, "Short Remarks," p. 3, NO-2366.

68. See, for example, *IMT*, 20:493-95; 42:551-62.

69. For a conflicting view, see Eugen Kogon, *Der SS-Staat: Das System der deutschen Konzentrationslager* (Berlin, 1947), pp. 277-80.

brink of total defeat.⁷⁰ But the survival of residues of the *Rechtsstaat* in this most unlikely of milieus offers grounds for intriguing speculation. Might a post-Hitlerian Third Reich, deprived of the charismatic and supralegal Führer Will, have quickly reverted to more traditional authoritarian norms?

70. Buchenwald Trial, 12/2900; *Anatomie*, 2:132–33.

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